

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF)	FINDINGS OF FACT,
JAMES W. WEST FOR AN AQUACULTURE)	CONCLUSIONS OF LAW AND
LEASE LOCATED SOUTH OF PREBLE ISLAND)	DECISION
IN FRENCHMAN BAY, SORRENTO, HANCOCK)	
COUNTY, MAINE)	

On November 3, 2000, James W. West of Sorrento, Maine, applied for an aquaculture lease totaling 35 acres of coastal waters of the State of Maine, located south of Preble Island in Frenchman Bay, Sorrento, Hancock County, Maine. The applicant requested the lease for a term of ten years for the purpose of cultivating blue mussels (*Mytilus edulis*) and sea scallops (*Placopecten magellanicus*), using suspended culture techniques.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that the Commissioner of the Department of Marine Resources (DMR) may grant a lease if it is determined that the project will not unreasonably interfere with the ingress and egress of riparian owners, navigation, fishing or other uses of the area; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

A public hearing on this application was held on February 4, 2002 at 6:00 p.m., in Sorrento.

Evidence Concerning the Nature and
Impact of the Proposed Lease

The applicant, Mr. James W. West, provided testimony on the application and responded to questions.

The applicant testified that he is a life long Sorrento resident and fourth generation fisherman. His 22 years of fishing experience includes fishing for lobster, urchins, scallops, gill

netting, shrimp, quahogs and mussels. He owns several fishing vessels including a 42-foot dragger, a 40-foot dragger and a 28-foot lobster boat. The proposed lease site was selected for its remote location and former history as a salmon farm that, in his opinion, did not interfere with navigation or fishing activity. The applicant testified that proposed lease would allow him to get into the cultured mussel market to better compete with cultured mussel competition located in Prince Edward Island, Canada versus continuing to harvest mussels from the wild. Exhibits 1 & 2.

According to the applicant, the lease site would contain a maximum of sixty 40' x 40' rafts, moored in sets of 3 tandem rafts. The applicant explained that while the application described the rafts as being 40' x 45', they would not exceed 40' x 40' because the company that produces the hot-dipped galvanized steel for the rafts does not manufacture steel in lengths longer than 40'. The applicant testified that his intent is to start up during the month of May with 1 – 2 rafts and add 1 – 2 rafts per year over the next 10 years. He would like end up with a maximum of 10 rafts, or possibly 20, instead of 60 due to financial considerations. He explained that each raft would have 450, thirty to thirty-six feet long, ½ inch dropper ropes suspended from wooden timbers. Seed mussels would be attached to the dropper ropes using a socking machine. Then the mussels would be left to grow to market size, which takes about one year. The outermost corners of the rafts would be moored using 6,000-pound granite blocks connected with 30 feet of one-inch chain and approximately 225 feet of 1½ -inch poly steel rope for scope. Three rafts would be connected in tandem using 15 feet of 1-inch chain between the rafts and positioned amongst the four moorings. The applicant explained that he would be cautious about how well the rafts will stay together during a big storm particularly in winds from the southwest exposure.

The applicant testified that he would experiment building 10' x 10' weighted PVC panels that would have vertically strung PVC pipes held in place by rope running through each pipe, spaced 6 to 12 inches apart that would be suspended along the sides of each raft to depths of 40 feet. The panels would be weighted and connected at the corners to reduce swing. The

panels would be used instead of the more commonly used 12-inch predator mesh net to deter diving ducks and curious seals. In his opinion, the more rigid deterrent may work better than netting. He would use a pressure washer from his boat to clean the panels to reduce fouling. The washer would be powered with a 10 hp Honda engine or possibly from hydraulics on his boat.

The application describes the bottom composition to be a soft, muddy bottom with a flat topography and water depths of 75 feet at mean low water (MLW) to 85 feet at mean high water (MHW). These depths allow for approximately 40 feet of clearance at MLW between the bottom of the 30 to 35-foot dropper lines and the sea floor. Local flora was described as nonexistent or quite limited. A drag taking five, 3-minute tows across the proposed site landed two crabs and remnant seaweed on January 28, 2001. A single tow was repeated by the applicant on January 28, 2002 who testified that a single tow yielded only mud and drift seaweed. The surface current measurements estimated a range of 1.2 to 13.3 cm/sec.

The applicant explained that the navigational use of the general area is by pleasure craft, which peaks during the summer from June – September. According to the application the peak volume of traffic would be approximately 100 boats on a daily basis, primarily on a weekend during sailboat races. The traffic generally parallels the Preble Island shore between the proposed site and Preble Island. The applicant testified that traffic is also heavy at the entrances to Flanders Bay, between Calf and Preble Island, and between Calf Island and Dram Island. In his opinion there is ample distance from the northern end of the proposed lease and Preble Island in which vessels could also easily navigate without getting close to the lobster gear that is fished along the shore of Preble Island out to the 60-foot depth contour. In the opposite direction, towards Bar Harbor, the nearest distance to shore is roughly 3 miles to Porcupine Island.

The applicant testified that there is no commercial fishing activity in the general area of the proposed lease. He stated that lobster is fished heavily in waters out to 10 fathoms (60 feet), off Preble Island and not beyond due to the soft mud where they do not catch lobsters. He

testified that nearest area that scallops are fished is approximately ½ mile due east-southeast of the proposed lease.

The applicant testified that seed mussels would be obtained from the wild, as allowed by DMR regulations (Chapter 12), or if available from the mussel seed producer Tighrope Sea Farms in Blue Hill. There is also the possibility of obtaining seed mussels that collect naturally on the gear used at salmon farms. The applicant testified that he included sea scallops in his application, as he would like to try them in the future. He would obtain scallop seed from hatcheries that produce scallop seed such as Pemaquid Oyster Company in Bremen, the Beals Island Regional Shellfish Hatchery in Beals or, if allowed, from the wild or collected from proposed site.

The applicant testified that he would keep a logbook similar to his federal fishing permit logs that he would begin when the rafts were initially seeded. He would log harvest quantities, dates of all activities, maintenance work on the rafts or mooring tackle and diver checks that would take place every few weeks. According to the application, rafts would be seeded with mussels using an AGUIN machine that feeds seed through a hopper onto biodegradable cotton, which is wrapped around the mussels to hold them in place until the mussels attach to the ½-inch dropper line. Once seeded the rafts would be inspected at least 2 days per week. The mussels would reach harvest size in approximately a year then harvest activities would begin.

The applicant owns vessels capable of lifting the ropes from the rafts. Once lifted the ropes are placed in a basket to be loaded in a hopper onboard his boat. The mussels are declumped into individual mussels, graded and washed with the smaller mussels saved to be reseeded on ropes. The market size mussels would be placed in totes or containers. When the quantity is harvested for a given market the cultured mussels would be transferred to shore without any need to be placed in the water as conventionally done with the wild harvested mussels. The containers would go directly from his boat or skiff to a vehicle. The applicant testified that he estimates it would require 5 hours, or one day, to harvest 30 – 40 dropper lines that yield up to 3 or 4 bushels per line. One raft may produce up to 1,500 bushels per year.

The applicant testified that he keeps 3 vessels in the Lower Harbor and his lobster boat is moored in the Upper Harbor. He explained that he currently uses the Upper Landing on nearly a daily basis for unloading lobsters (9-10 months of the year), to load bait or fuel and to work on his boats occasionally. He stated that the difference in his activities would be that the method in which he would unload mussels would change. Instead of transferring bagged wild mussels to the shore at high tide, (to be left on the beach or landing until low tide to be picked up, then trucked away); he would instead be able to transfer cultured mussels in totes or similar containers from a boat or skiff directly to a truck. This would be similar to landing lobsters for example. This would eliminate the need to place the shellfish in the waters at the public landing, which is an area subject to seasonal water quality closures due to bacterial pollution.

The applicant testified that the harvest frequency of cultured mussels would vary from 0 to 5 days per week. However the amount harvested at any one time from a raft would be smaller compared to wild harvest. Also, since the method of landing would eliminate the use of the beach, the amount of time required to use the public ramp for purposes of landing mussels would be much reduced and therefore lessen his use of the Town facility for landing activities. The applicant added that there are other landing facilities available for access and landing product, which he uses on occasion now. Those facilities are located in the nearby towns of Hancock and Sullivan. He stated that he has discussed the summertime use of the Town ramp with one of the Sorrento Selectmen and persons on the harbor committee. He stated that they informed him that unloading uses shouldn't be a problem as long as he did not abuse it, such as staying tied up at the Town dock for 3 – 4 hours at a time, or blocking the ramp from other users and being unwilling to move if someone else need to gain access. He indicated that he is willing to operate in a way that does not cause unreasonable interference with the use of the ramp by others. He explained that he also intends to rebuild a wharf on family owned property that would take some of the pressure off use of the Town ramp for unloading mussels.

The applicant testified that he has communicated directly with the Ewing family, property owners of the "Lower Beach" in Eastern Harbor. He understands and is willing to comply with

their request that their property not be used to off-load or land mussels. The applicant testified that it is his understanding that he may use the Ewing private property for the purpose of accessing his boats moored in the harbor, such as to travel to and from the proposed lease. Exhibit 4.

A biologist, employed by the Department, testified about his observations during a site visit and an under water video of the propose site, and to information in his report. The biologist and his assistant visited the proposed lease on August 30, 2001. The biologist testified that, based on the survey quality differentially corrected global positioning system (dGPS), the corrected acreage would be 35.66 acres. The nearest distance to shore, which is Preble Island, would be approximately 1,173 feet or roughly 1,200 feet from the proposed northwest corner. The water depths are deep, ranging from 64 to 81 feet at mean low water (MLW). The bottom is soft mud with a flat topography. In his opinion, there would be more than adequate water depth at the proposed site such that he would not be concerned that the lines would touch the sea floor. He noted that the heavy amount of planktonic material visible in the underwater video indicated that there is plenty of food available for the mussels to feed on. He explained that the local flora was non-existent and fauna included shrimp species, burrows that are likely created by wry-mouth eels and an occasional crab. Exhibit 3.

The biologist testified that lobster buoys were not observed within the proposed lease boundaries, or beyond the 60-foot contour off Preble Island, likely where the bottom breaks in to a soft mud shelf. Inside the 60-foot contour approximately 20 – 30 buoys could be seen. The area is classified as “open approved” for the harvest of shellfish according to the Department’s Public Health Division. Regarding navigation the biologist testified that the approximate 1,200 foot distance between the proposed lease and the Preble Island shore due north would be more than adequate for any large vessel transiting to Sorrento Harbor or Preble Island. He suggested that if the lease were granted that the applicant should be sure to inquire in his permit process with the Army Corp of Engineers and US Coast Guard whether night navigation lighting would be appropriate given the low lying structure of the proposed rafts located in the large expanse of

open water. According to the biologist's report the local Marine Patrol Officer indicated that the previous occupant of the proposed lease site did not interfere with fishing or navigation in the area.

The biologist testified that the proposed lease is located outside of any nearby bald eagle nest ¼ mile boundary, regulated by the Department of Inland Fisheries and Wildlife (IF&W). He clarified that a general statement in the IF&W memo in his report regarding construction timing would likely be a concern if, for example, the rafts were built using impact wrenches on site or near the shore of Preble Island in May or June when the eagles are nesting. The applicant testified that he would not be building any rafts outside of Preble and the noisiest thing would be his boat running.

A local lobster fisherman and member of the Zone B Lobster Management Council, District 1, provided a written statement just prior to the hearing, as he could not stay to attend the hearing. He indicated no objection to the proposed lease and that, in his opinion, it would not interfere with fishing or navigation in the area.

The chair of the Sorrento Harbor committee provided testimony. He expressed concern that problems may arise if the commercial activity is successful such that it requires greater use of the Sorrento Upper Harbor landing, as that facility would likely not be able to handle the strain. He testified that there are specific concerns about impacts on the Harbor's activity and launching ramp. Impacts that present problems in the future would likely have to be addressed and the users of the public facilities must comply with any changes that become necessary to implement.

Findings of Fact

According to the Department's biologist report, the proposed lease is located approximately 1,173 feet from the proposed northwest corner to the nearest shore at the high water mark on Preble Island. Access or use of Preble Island was not requested nor required by the applicant. The applicant testified that access for the proposed lease would be from a municipal or private landing. Based on the evidence that the applicant does not request nor

require riparian access, that there is available public access and based on the Department's biologist report there is at least 1,173 feet to access the shore between the proposed lease and the nearest shore at high water, I find that the lease will not unreasonably interfere with the ingress and egress of the riparian owners.

The proposed lease is located in water depths that range from 64 feet of water at MLW to 81 feet at MHW in the southwest portion of Flanders Bay. The proposed lease is located approximately 1,173 feet from the nearest shore, which is the southern side of Preble Island in Frenchman Bay. Written testimony, hand delivered just prior to the hearing by a local lobster fisherman, who is a member of the Zone B Lobster Management Council, indicated that the proposed lease would not interfere with lobster fishing or navigation in the proposed lease area. The Department's biologist testified that there is ample room and depths for large vessels to navigate between the proposed lease boundary, the shore of Preble Island, and entrances to Sorrento Harbor and Flanders Bay northerly of the proposed site. The biologist's report also included confirmation by a DMR Marine Patrol Officer, who was familiar with the previous occupant of the proposed lease site, and that the prior occupants did not present problems for existing uses of the area. Based on the evidence, I find that the lease will not unreasonably interfere with navigation in the area.

Testimony by the applicant and the Department's biologist indicated that the primary fishery in the general area is for lobster and that the proposed lease area is not located in an area that is fished for lobsters, primarily due to the soft mud bottom that is not preferred by lobster. The applicant indicated that the nearest scallop fishing grounds are approximately ½ mile southeast. The area of the proposed lease is located in waters classified as open for the harvest of shellfish according to the biologist's report. Based on the testimony and evidence, I find that the lease will not unreasonably interfere with fishing, aquaculture leases, or other uses of the area.

The proposed lease has ample water depths and other favorable characteristics to accommodate the applicants' proposed activities. Blue mussels and sea scallops would come

from indigenous sources within Maine. The proposed activities involve only the rearing of shellfish using drop lines suspended from rafts. Bottom planting is not requested. According to the Department biologist's report, the proposed lease does not fall within a Department of Inland Fisheries and Wildlife Essential Habitat for Endangered or Threatened Species designated ¼ mile boundary. No information in the record indicated that the proposed activities would cause interference with local flora or fauna. Based on this evidence, I find that the proposed activities will not unreasonably interfere with the ability of the site and surrounding areas to support existing ecologically significant flora and fauna.

Seed mussels would be obtained from Maine waters by drag, as allowed by Department regulations, or from a nursery source such as Tighrope Seafarms in Blue Hill. Sea scallop seed would be obtained from hatcheries such as Pemaquid Oyster Company, the Beals Island Regional Shellfish Hatchery or from the wild as allowed by Department regulations. Based on this evidence, I find that there is an available source of blue mussels and sea scallops.

The applicant testified that he would access the proposed lease from either the public landing in Sorrento or as permitted from the private Ewing property as described in the record. The applicant testified that he would not use the Ewing property to off-load mussels as prohibited by the landowner in Exhibit 4. The applicant testified that landing of cultivated mussels would be accomplished using containers directly moved from his boat or a skiff to a truck, without the use of the intertidal shore as conventionally done with wild harvested mussels. The applicant testified that the amount of time required to use landing facilities for cultivated mussels would be much reduced compared to landing activities for wild harvested mussels. The applicant testified to his willingness to work with the Town regarding use of the Sorrento Town landing, as it is in his best interest to insure that the facility remains open for future commercial use as described in the record. The applicant testified that he might use landing facilities located in the nearby towns of Hancock and Sullivan instead of Sorrento. Testimony by the chair of the Sorrento Harbor Committee indicated that the applicant would need to comply with changes to the harbor use requirements if commercial use of the existing town ramp increases from his and or other

activities. The applicant acknowledged those concerns and agreed to comply. Based on the above, I find that the aquaculture lease activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

Conclusions of Law

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. The aquaculture lease activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;
4. The aquaculture lease activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of blue mussels and sea scallops; and
6. The aquaculture lease activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

The evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072(7-A).

Decision

Based on the foregoing, the Commissioner grants the requested aquaculture lease of 35.66 acres to the applicant for a period of ten (10) years from the date of this decision, for the purposes of cultivating blue mussels (*Mytilus edulis*) and sea scallops (*Placopecten magellanicus*), using suspended culture techniques as described in the hearing record. The

applicant shall pay the State of Maine rent in the amount of \$50 per acre per year. The applicant shall post a bond or establish an escrow account in the amount of \$5,000, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

Conditions to be Imposed on Lease

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. lobster fishing, other commercial fishing and recreational fishing is allowed on the open areas of the lease; and
2. the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)
Department of Marine Resources